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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

STATE OF CALIFORNIA, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, Secretary of
Health and Human Services, *et al.*,

Defendants,

and,

THE LITTLE SISTERS OF THE POOR,
ST. MARY'S HOME, *et al.*,

Defendant-Intervenors

Case No.: 4:17-cv-5783-HSG

JOINT STATUS REPORT

On August 17, 2021, the Court stayed this case and ordered the parties to file status reports every three months. ECF No. 467. The parties report as follows:

1. This case concerns the validity of two rules which create a moral exemption, and

1 expand a religious exemption, to the rules establishing the contraceptive coverage
 2 requirement. *See* Religious Exemptions and Accommodations for Coverage of
 3 Certain Preventive Services Under the ACA, 83 Fed. Reg. 57,536 (Nov. 15,
 4 2018); Moral Exemptions and Accommodations for Coverage of Certain
 5 Preventive Services Under the ACA, 83 Fed. Reg. 57,592 (Nov. 15, 2018).

6 2. The Court has before it fully briefed dispositive motions, *see* ECF Nos. 311, 366,
 7 368, 370, as well as supplemental briefs addressing the Supreme Court’s decision
 8 in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct.
 9 2367 (2020), *see* ECF Nos. 433, 435, 437, 438, 440.

10 3. On August 3, 2021, the parties filed a joint status report, in which Federal
 11 Defendants asked the Court to stay the case to permit the defendant agencies to
 12 evaluate the issues presented by this litigation, as well as their regulatory and
 13 policy options. ECF No. 462. The Court had once previously held the motions
 14 in abeyance. ECF No. 454. Plaintiffs and intervenor March for Life did not object
 15 to the request. Intervenor Little Sisters objected.

16 4. On August 16, 2021, Federal Defendants announced that “[t]he Departments [of
 17 Health and Human Services, Treasury, and Labor] intend to initiate rulemaking
 18 within 6 months to amend the 2018 final regulations and obtaining public input
 19 will be included as part of the Departments’ rulemaking process.” CMS.Gov,
 20 Frequently Asked Questions, Affordable Care Act Implementation FAQs (Set 48)
 21 (Aug. 16, 2021) (available at [https://www.cms.gov/CCIIO/Resources/Fact-](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs#Affordable_Care_Act)
 22 [Sheets-and-FAQs#Affordable Care Act](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs#Affordable_Care_Act)).

23 5. On August 17, 2021, the Court held a case management conference. The Court
 24 granted Federal Defendants’ request to stay the case and directed “counsel . . . to
 25 e-file a joint status report every three months.” ECF No. 467.

26 6. The Court held another status conference on May 17, 2022.

27 7. The Federal Defendants report that they have made available for public inspection
 28

a notice of proposed rulemaking that would “amend regulations regarding coverage of certain preventive services under the Patient Protection and Affordable Care Act, which requires non-grandfathered group health plans and non-grandfathered group or individual health insurance coverage to cover certain contraceptive services without cost sharing.” U.S. Dep’t of Treasury, U.S. Dep’t of Labor, & Dep’t of Health & Human Servs., *Coverage of Certain Preventive Services Under the Affordable Care Act* (Jan. 30, 2023), <https://public-inspection.federalregister.gov/2023-01981.pdf> (unpublished, public inspection version). The proposed rule is scheduled to be published on February 2, 2023. The comment period for the proposed rule will be open for sixty days after the publication of the rule.

8. Federal Defendants propose that the case remain stayed and that Federal Defendants continue to file status reports every three months to apprise the Court of the status of the rulemaking and their position on the need for a continued stay. The next status report will therefore be due on May 1, 2023.
9. Plaintiff States do not oppose the proposal of the Federal Defendants.
10. Intervenor March for Life does not oppose the proposal of the Federal Defendants.
11. Intervenor Little Sisters of the Poor proposes that the case be re-opened now. The Notice of Proposed Rulemaking sets forth the federal government’s proposal to “**maintain** the religious exemption from the November 2018 Religious Exemption final rules.” Notice of Proposed Rulemaking, *Coverage of Certain Preventive Services*, at 36 (emphasis added). If the plaintiff States still believe such a religious exemption is illegal—which they have claimed to this Court since 2017—then they should litigate that claim now. If the plaintiff States have had a change of heart and now agree with the federal government that a religious exemption is legal, and that governments can deliver contraceptives to women without the involvement of religious objectors, then the Court should just enter

1 judgment against them because they have conceded their case. The governments’
2 proposed third way—essentially an indefinite stay in this Court so that they can
3 keep the *political* issue alive into a second decade or a fourth presidential
4 administration—is an abuse of this Court.

5 The States’ failure to prosecute their case over the past several years stands in
6 sharp contrast to their initial representations to this Court that a religious
7 exemption was both (a) illegal and (b) so deeply and urgently harmful that this
8 Court needed to act on an emergency basis, twice, to make sure no such exemption
9 ever took effect, even for a minute. The intervening years of failure to prosecute,
10 even while the supposedly dangerous religious exemption has been in effect,
11 debunk those claims. Worse, original lead plaintiff Xavier Becerra—who once
12 insisted that this Court needed to act urgently because religious exemptions were
13 illegal and would stop governments from getting contraceptives to women—has
14 now announced that a rule **retaining** the very same religious exemption in fact
15 “works to ensure that the tens of millions of women across the country who have
16 and will benefit from the ACA will be protected. It says to women across the
17 country, we have your back.” U.S. Dep’t of Health and Human Servs., *Biden-*
18 *Harris Administration Proposes New Rules to Expand Access to Birth Control*
19 (Jan. 30, 2023), [https://www.hhs.gov/about/news/2023/01/30/biden-harris-](https://www.hhs.gov/about/news/2023/01/30/biden-harris-administration-proposes-new-rules-expand-access-birth-control-coverage-under-affordable-care-act.html)
20 [administration-proposes-new-rules-expand-access-birth-control-coverage-under-](https://www.hhs.gov/about/news/2023/01/30/biden-harris-administration-proposes-new-rules-expand-access-birth-control-coverage-under-affordable-care-act.html)
21 [affordable-care-act.html](https://www.hhs.gov/about/news/2023/01/30/biden-harris-administration-proposes-new-rules-expand-access-birth-control-coverage-under-affordable-care-act.html) (quoting Secretary Becerra).

22 The religious exemption has been in effect for years, is in effect today, and
23 the Notice of Proposed Rulemaking now proposes to keep it in effect. There is no
24 further reason for delay. The Little Sisters respectfully request that this case be re-
25 opened and litigated or conceded to swift and final resolution.

1 Dated: February 1, 2023

Respectfully submitted,

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